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NO. _____

Supreme Court, U.S.
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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER 1989 TERM

JOSEPH M. WARD

PETITIONER-PLAINTIFF

V

HILLHAVEN, INC., THE HILLHAVEN
CORPORATION, NATIONAL MEDICAL
ENTERPRISES, INC., WILLIAM
MCCONNELL, JR. AND JEFFREY M.
MCCAIN

DEFENDANTS

PETITION FOR WRIT OF CERTIORARI TO
THE NORTH CAROLINA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- I. PURSUANT TO THE 1ST AMENDMENT OF THE UNITED STATES CONSTITUTION, DOES THE PETITIONER-PLAINTIFF'S PROTECTION FROM FALSE DEFAMATION OF THE DEFENDANTS BEGIN AT THE SAME POINT WHERE THE DEFENDANTS' RIGHT TO FALSELY DEFAME HIM ENDS?
- II. DOES THE TRIAL COURT'S DISMISSAL OF ALL OF THE PETITIONER-PLAINTIFF'S CLAIMS VIOLATE HIS RIGHT TO BE PROTECTED FROM UNJUSTIFIED FALSE DEFAMATION, PURSUANT TO THE 1ST AMENDMENT OF THE UNITED STATES CONSTITUTION, AND/OR DENY HIS RIGHT TO A CLAIM (S) RECOGNIZED UNDER NORTH CAROLINA LAW, THEREBY DENYING HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS, PURSUANT TO THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

III. DOES THE AFFIRMATION BY THE NORTH CAROLINA COURT OF APPEALS OF THE TRIAL COURT'S DISMISSAL OF ALL OF THE PETITIONER-PLAINTIFF'S CLAIMS VIOLATE HIS RIGHT TO BE PROTECTED FROM UNJUSTIFIED FALSE DEFAMATION, PURSUANT TO THE 1ST AMENDMENT OF THE UNITED STATES CONSTITUTION, AND/OR DENY HIM HIS RIGHT TO A CLAIM (S) RECOGNIZED UNDER NORTH CAROLINA LAW, THEREBY DENYING HIM HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS, PURSUANT TO THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

IV. DOES THE DISMISSAL OF THE PETITIONER-PLAINTIFF'S APPEAL AND/OR THE DENIAL OF HIS PETITION FOR DISCRETIONARY REVIEW BY THE NORTH CAROLINA SUPREME COURT VIOLATE HIS RIGHT TO BE PROTECTED FROM UNJUSTIFIED FALSE

DEFAMATION, PURSUANT TO THE 1ST
AMENDMENT OF THE UNITED STATES
CONSTITUTION AND/OR DENY HIM HIS
RIGHT TO A CLAIM (S) RECOGNIZED
UNDER NORTH CAROLINA LAW THEREBY
DENYING HIM HIS RIGHT TO DUE PROCESS
AND EQUAL PROTECTION UNDER THE LAWS,
PURSUANT TO THE 5TH AND 14TH
AMENDMENTS OF THE UNITED STATES
CONSTITUTION?

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REFERENCE TO OFFICIAL AND
UNOFFICIAL REPORTS OF OPINIONS
DELIVERED IN THIS CASE BY OTHER COURTS

This action was dismissed pursuant to Rule 12 (b)(6) of the North Carolina Rules Of Civil Procedure by an Order entered in Pitt County (N.C.) Superior Court. In an unpublished Opinion (not to be given consideration in other cases), the North Carolina Court Of Appeals affirmed the dismissal. The North Carolina Supreme Court later issued an Order dismissing the appeal of the Plaintiff-Appellant (the Petitioner) and denying his petition for discretionary review. See Appendix, pp 1-13.

STATEMENT OF THE GROUNDS ON
WHICH JURISDICTION OF THIS COURT
IS INVOKED

The Petitioner seeks review of the Order of the North Carolina Supreme Court

entered in this action on April 9, 1990, the Opinion of the North Carolina Court of Appeals entered on January 16, 1990 and the Order (dismissing all of his claims) entered in Pitt County Superior Court (N.C.) entered on May 8, 1989. No order respecting a rehearing was entered and no order or extension of time to file a petition for a writ of certiorari was entered. The Petitioner believes that Article 3 of the United States Constitution and the 1st, 5th and 14th Amendments of the United States Constitution confers this Court jurisdiction to review the orders and the opinion in question. The Petitioner-Plaintiff believes that 42 USCS, Section 1981 and 1982 confers on this Court jurisdiction to review the orders and the opinion in question. The Petitioner believes that Section 1983 confers jurisdiction by providing for relief under its "other proper proceeding for redress" clause.

CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED IN THIS CASE

The following constitutional provisions and statutes are involved in this case.

(a) The 1st Amendment of the United States Constitution which states as follows:

Congress shall make no law respecting an establishment of religion, or preventing the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the Government for a redress of grievances.

(b) The 5th Amendment of the United States Constitution, the pertinent portion of which states as follows:

No person shall * * be deprived of life, liberty, or property, without due process of law * *

(c) Section 1 of the 14th Amendment of the United States Constitution, the pertinent portion of which states as follows:

* * No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

(d) North Carolina General Statute 1A-1, Rule 12 (b) (6), the pertinent portion of which states as follows:

(a) _____

(b) HOW PRESENTED.

Every defense in law or fact to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or a third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defense may at the option of the pleader be made by motion

(1) _____

(6) Failure to state a claim upon which relief can be granted. _____

STATEMENT OF THE CASE

(a) Statement of Proceedings:

The Petitioner (Plaintiff) initiated this action, Pitt County (N.C.) 88CVS560, on April 13, 1988 by filing his complaint alleging libel and slander, (thereby raising an

issue as to the rights of the defendants and his own rights pursuant to the 1st Amendment of the United States Constitution) conspiracy, fraud, harassment, false light interference with right to privacy (thereby raising an issue to the rights of the defendants and his own rights pursuant to the 1st Amendment of the United States Constitution) breach of contract, interference with contracts and solicitation of fraud. See Appendix, pp 14-66. On May 13, 1988, the Petitioner-Plaintiff filed his Amended Complaint. On June 9, 1988, the defendants filed their Motion To Dismiss, pursuant to Rule 12 (b)(6) of the North Carolina Rules Of Civil Procedure. (They never filed a responsive pleading and failed to appear at a scheduled deposition, instead filing a motion to quash the deposition which was never heard.) On September 30, 1988, the 12 (b)(6) Motion To Dismiss was heard out of

session before the Honorable David E. Reid, Jr., Senior Resident Superior Court Judge, Third Judicial District (N.C.). At the hearing, the Plaintiff-Appellant opposed the dismissal, thereby raising an issue as to due process and equal protection under the laws, pursuant to the 5th and 14th Amendments of the United States Constitution. Judge Reid took the Motion To Dismiss under advisement. Some 7 months later, on May 8, 1989, an Order granting the Defendants' Motion To Dismiss as to all of the Petitioner-Plaintiff's claims was entered out of session by Judge Reid. On May 12, 1988, the Petitioner-Plaintiff filed his Notice Of Appeal from the Order allowing the Motion To Dismiss, thereby continuing the issue as to due process and equal protection under the laws, pursuant to the 5th and 14th Amendments of the United States Constitution and continuing the issue as to the rights of the defendants and his own

rights in connection with his claims for libel, slander and false light invasion of privacy.

In the North Carolina Court of Appeals, the Petitioner-Plaintiff continued the issue as to his rights and those of the defendants, pursuant to the 1st Amendment of the United States Constitution, by filing a copy of the Amended Complaint containing claims for libel, slander and (false light) invasion of privacy as part of the Record On Appeal on June 26, 1989. Filing of a copy of the complaint as part of the Record On Appeal also continued the issue as to his rights to due process and equal protection of the laws, as did assigning as error (in the Record On Appeal) the Order granting the Defendants' Motion To Dismiss on the grounds that it is both contrary to law and violates the Petitioner-Plaintiff's right to due process and equal protection of the laws pursuant to the 5th

and 14th Amendments of the United States Constitution.

In his Brief filed in connection with his appeal to the Court of Appeals, the Petitioner-Plaintiff argued that the dismissal of his claims violates his rights to due process and equal protection of the laws pursuant to the 5th and 14th Amendments of the United States Constitution.

The North Carolina Court Of Appeals entered an Opinion affirming the trial court's dismissal of all of the Petitioner-Plaintiff's claims on January 16, 1990. See Appendix, pp 3-11. The Petitioner-Plaintiff filed his Notice Of Appeal and Petition For Discretionary Review with the North Carolina Supreme Court on February 19, 1990, thereby continuing the issue as to due process and equal protection under the laws, pursuant to the 5th and 14th Amendments of the United States Constitution and the issue

as to the 1st Amendment rights of the defendants and himself. In the joint notice and petition, he noted, under Statement Of Proceedings that a claim for libel and slander and a claim for (false light) invasion of privacy had been dismissed by the trial court and further noted that the dismissal had been affirmed by the North Carolina Court of Appeals (thereby continuing the issue as to the rights of the defendants and his rights pursuant to the 1st Amendment of the United States Constitution). In the Notice Of Appeal, the Petitioner-Plaintiff specifically raises an issue as to whether or not the dismissal of all of his claims violates his right to due process and equal protection of the laws, pursuant to the 5th and 14th Amendments of the United States Constitution. On April 19, 1990, the North Carolina Supreme Court entered an Order dismissing the Petitioner-

Plaintiff's appeal and denying his Petition For Discretionary Review. The Court offered no findings of fact or law in doing so. See Appendix, pp 12-13.

(b) Statement of the Facts

Central to the Petitioner-Plaintiff's Amended Complaint in Pitt County 893SC663 are the following allegations:

Defendant William McConnell, Defendant Jeffery McKain, several other employees of Hillhaven, Inc. and Hillhaven, Inc. Counsel Rich Feinstein were present at a meeting at about 4 P.M. on April 15, 1987. False statements indicating that the Plaintiff (Medical Director and an attending physician at University Nursing Center) had failed to issue orders necessary to the health care of his patient, Robert Edmondson, Jr., who resided at University Nursing Center, were made by one or more of

those present at the meeting.

Further, a wrongful decision was made to require Robert B. Edmondson, Jr. to leave University Nursing Center and his son, Robert B. Edmondson, III was given 5 days written notice of the planned forced discharge of his father. Defendant McConnell falsely stated or falsely inferred or falsely intimated to both Robert B. Edmondson, Jr.'s son and mother that the Plaintiff had failed to treat Robert B. Edmondson, Jr. properly and inferred or intimated, or suggested to both his son and his mother that Robert B. Edmondson, Jr. might be allowed to remain at University Nursing Center if a new attending physician was obtained for him. The decision to force Robert Edmondson, Jr. to leave University Nursing Center was made without any physician input. Physician input should have been

obtained before the decision was made.

See Appendix pp 19-22.

The Amended Complaint goes on to allege successful counter measures taken by the Plaintiff which prevented the forced discharge of Robert E. Edmondson, Jr. The Amended Complaint further alleges that pursuant to a plan involving himself and one or more other Hillhaven, Inc. employees, Defendant McConnell falsely stated to Robert Edmondson, Jr.'s son that the decision to cancel the planned forced discharge was based on Robert Edmondson, Jr.'s weight having stablized plus the discovery of a proper method by which one of his medicines could be administered. See Appendix, pp 25-27.

The Amended Complaint further alleges:

(a) That a number of wrongful acts and/or omissions complained of were carried out as part of a deliberate effort to get the Plaintiff to

resign as Medical Director at University Nursing Center and/or in an effort to get him to markedly restrict or terminate his activities as an attending physician at University Nursing Center.

(b) That contracts were in effect between University Nursing Center and/or Hillhaven, Inc. and the Plaintiff and between the Plaintiff and his patients.

(c) That a number of wrongful acts and/or omissions complained of breached the contracts in effect between University Nursing Center and/or Hillhaven, Inc. and the Plaintiff and/or interfered with contracts in effect between the Plaintiff and his patients.

(d) That a number of wrongful acts and/or omissions complained of were

carried out for the purpose of harassing the Plaintiff and inflicting emotional distress on him.

(e) That the wrongful acts and/or omissions of the defendants were carried out with wanton and willful disregard for the rights of the Plaintiff and were due to actual malice on the part of the defendants.

(f) That the Plaintiff has suffered special damages and general damages, including severe emotional distress as a result of the wrongful acts of the defendants.

See Appendix, pp 42-45, 47-63.

REASONS FOR ALLOWANCE OF

WRIT OF CERTIORARI

(a) The Petitioner Did Not Violate Any Reasonable Court Rules Or Procedures Which Should Have Adversely Affected The Outcome Of His Appeal.

On page 8, the North Carolina Court of Appeals' Opinion states that the Appellant (Petitioner-Plaintiff) raises several constitutional claims for the first time in his brief. The Court declined to consider those arguments because it found that they were not presented to or considered by the trial court nor were they preserved in the Record On Appeal.

The Petitioner-Plaintiff's Complaint and Amended Complaint contain a libel and slander claim and factual allegations supporting such a claim. See Appendix, pp 47-49, 19-23, 28-31. It is clear that State law relating to false defamation is required to be tailored so as not to violate the 1st Amendment rights of either defendants or plaintiffs. The Petitioner-Plaintiff respectfully submits that by filing his Complaint, he raised an issue as to both his and the defendants' rights pursuant to the 1st Amendment of the

United States Constitution, that his Amended complaint preserved the issue and that his opposition to the dismissal of his false defamation claim in the trial court and during the appellate process has kept the constitutional issue as to his rights under the 1st Amendment alive. Non-supported mouthing as to one's constitutional rights is not usually given consideration by the courts and rightly so. The Petitioner-Plaintiff submits that specific mouthing of one's rights as being 1st Amendment rights, when a claim is obviously controlled by 1st Amendment Constitutional law, should not be required by the courts.

Much of the time, requiring an objection on constitutional grounds before or at the point evidence violating one's constitutional rights is introduced at a trial is reasonable, as is requiring one to raise the issue when a statute at the heart of a controversy is sought to be declared unconstitutional.

However, general considerations of due process and equal protection under the laws, pursuant to the 5th and 14th Amendments of the United States Constitution, are part of the foundation of our legal system and should be given automatic consideration in any court proceeding. Therefore, a requirement that one make an issue as to his rights to due process and equal protection before those rights have been violated is not reasonable unless it is clear that some court action is about to occur which will violate those rights. Idle mouthing of one's rights to due process and equal protection under the laws, when such rights have not been violated and do not appear threatened, irritates many judges. That can lead to bias.

In the instant case, the order allowing the defendants' Motion To Dismiss was entered out of session some 7 months after the hearing on the motion was held. That time interval in itself supports a contention that

it was not clear at the hearing that the trial court was about to violate the Petitioner-Plaintiff's rights to due process and equal protection under the laws by dismissing those of his claims that are valid under North Carolina law. Exception to an order by a party who opposed entry of the order is considered automatic under North Carolina law. There is no requirement that a notice of appeal state the grounds for an appeal and such is not customarily done in North Carolina. If the Petitioner had done so, the proceedings of the case would not have been altered. Once a notice of appeal from a judgement is filed and served in North Carolina, the trial court is stayed as to proceedings upon the judgement appealed from, except as to matters related to settling the record on appeal. Collins v Collins 18 N.C. App. 45 at 50, 196 SE 2d 282 (1973). Clearly, the Petitioner had no reasonable opportunity to have the issue of the dis-

missal of his claims violating his constitutional rights of due process and equal protection under the laws considered by the trial court after all of his claims were dismissed.

The Petitioner raised the issue as to whether or not his rights to due process and equal protection under the laws, pursuant to the 5th and 14th Amendments of the United States Constitution, had been violated in his assignment of error in the Record On Appeal. See Appendix, p 67. Just why the North Carolina Court of Appeals' Opinion states that the Petitioner did not preserve his constitutional claims in the Record On Appeal is not clear. However, the Petitioner submits that the finding that he had not preserved his constitutional claims is less surprising than many of the other determinations in the Court of Appeals' Opinion.

On page 9, the North Carolina Court of Appeals' Opinion states (See Appendix, pp 10):

Finally, we note that the Appellant did not comply with N. C. Rule of Appellate Procedure 28 (b)(5) which requires that relevant authority be cited to support assignments of error. Unsupported assignments of error are taken as abandoned.

In support of that statement, the opinion cites Byrne v Bordeaux, 85 N.C. 262, 354 S.E. 2d 279 (1987). On page 279, the cited opinion states:

N.C. Gen. Stat. 1A-1, Rule 28 (b)(5) of the N.C. Rules of Appellate Procedure states that "the body of the argument shall contain citations of authority upon which the appellant relies."

The opinion in Byrne v Bordeaux, supra., was entered on April 7, 1987. Effective on June 30, 1988 the pertinent portion of Rule 28(b)

was amended so as to read as follows:

(b) Content of Appellant's Brief. An appellant's brief in any appeal shall contain, under appropriate headings, and in the form prescribed by Rule 26 (g) and the Appendixes to these rules, in the following order:

(1) _____

(5) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be

taken as abandoned. (Emphasis added.)

The Petitioner-Plaintiff respectfully submits that the above cited rule requires an appellant's brief to contain, as to each question presented, an assignment of error and either a reason or argument or citation of authority as to why the question should be decided in his favor. That is consistent with the Opinion of the North Carolina Supreme Court in Peaseley v Virginia Iron, Coal and Coke Company, 282 NC 585, 194 S.E. 2d 133 at 140 (1973) which states that as a general rule the Court will consider only those aspects of a decision of the Court of Appeals which are assigned as error in a petition for certiorari and "which are preserved by argument or the citation of authority with reference thereto in the brief filed by the petitioner in this Court." Apparently, at some point later than February 2, 1973 (when Peaseley, supra. was entered), Rule 28 (b) was changed so as to require both argument

and citation of authority and effective June 30, 1988, changed so as to require that either argument or reason or citation of authority. Just why the North Carolina Court of Appeals chose to cite the ruling and the governing rule in Byrne, supra, while ignoring the fact that the applicable appellate rule had been changed, is not clear.

The Petitioner submits that he complied with Rule 28 (b)(5) of the North Carolina Rules of Appellate Procedure even if he was required to both present argument and cite authority as to each question presented. The only question presented to the North Carolina Court of Appeals was:

DID THE COURT BELOW COMMIT REVERSABLE
ERROR IN GRANTING THE DEFENDANT-
APPELLEES' MOTION TO DISMISS PURSUANT
TO RULE 12 (b)(6) OF THE NORTH
CAROLINA RULES OF CIVIL PROCEDURE?

In seeking an affirmative answer to that

question, the Plaintiff-Appellant's Brief filed with the North Carolina Court of Appeals contains 7 pages of argument, cites Amendments 5 and 14 of the United States Constitution, cites two rules of N.C. General Statute 1A-1 and the opinion of 7 North Carolina appellate cases. His Reply Brief contains 11 pages of argument, cites three rules of N.C. General Statute 1A-1 and cites N.C. General Statute 131E-127.

(b) The Amended Complaint Filed In This Action Does Not Fail To State A Claim (s) Upon Which Relief Can Be Granted Under North Carolina Law.

When the North Carolina Rules of Civil Procedure became effective in 1970, fact pleading was purportedly replaced by notice pleading. In actuality, a hodge podge has resulted with considerable detailed fact pleading often being required by the plaintiff as to some claims (ie. false

defamation, fraud, breach of contract) while other claims (ie. motor vehicle negligence, professional malpractice) require only a short plain statement sufficiently particular to give the court and the parties notice of the transactions or occurrences intended to be proved showing that the pleader is entitled to relief. (Citations omitted.) The Petitioner submits that having widely varying requirements as to pleading different causes of action is constitutionally suspect.

Legal author William A. Shuford has referred to Sutton v Duke, 277 N.C. 94, 176 S.E. 2d 161 (1970) as being the leading case in North Carolina on the sufficiency of a statement of a claim for relief (under the then new North Carolina Rules of Civil Procedure). N. C. Civil Practice And Procedure (2d Ed), page 104. In that opinion, North Carolina Supreme Court Justice Susie Sharpe reviews the evolution of North Carolina Rule 8 (a)(1) and compares it with

similar Federal Rule 8 (a)(2) and with New York's Civil Practice Law and Rules, Section 3013. At that time, Federal Rule 8 (a)(2) required only "a short and plain statement of the claim showing that pleader is entitled to relief." At the same time, New York's Civil Practice and Law Rules, Section 3013, stated: "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and the material elements of each cause of action or defense."

(Emphasis added.) Then new North Carolina Rule of Civil Procedure 8 (a)(1) required (and still requires) that a claim shall contain "A short and plain statement of the claim sufficiently particular to give the court and the parties notice of transactions, occurrences, a series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief,____."

In Conley v Gibson 355 U.S. 41, 45, 78 S. Ct 19, 102, this Court stated that it follows "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (Emphasis added.) In American Dairy Queen Corporation v Augustyn D.C., 278 F. Supp. 717, the Court stated: "This rule generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery."

In Sutton v Duke, supra, Justice Sharp states that New York's Civil Practice Law and Rules became effective on September 1, 1967 and that shortly thereafter, in Hewitt v Maass, 41 Misc. 2d 894, 246 N.Y.S. 2d 670 (1964) it was stated: "Now, if notice, or literally comprehension can be had from a pleading the method of attaining the

communicable pattern become secondary." The court in Foley v D'Agostino, 21 A.D. 2d 60, 248 N.Y.S. 2d 121 (1964), which immediately followed Hewit, states that (under the new rules) it was intended "that the considerable judicial effort formerly expended in distinguishing 'evidence' or 'conclusion' from 'fact' be directed to more useful purposes * * * but it is clear that, under CPLR, the statements in pleadings are still required to be factual, that is, the essential facts required to give 'notice' must be stated."

In Sutton, supra., at page 167, the North Carolina Supreme Court states "Under the 'notice' theory of pleading contemplated by Rule 8 (a)(1), detailed fact-pleading is no longer required. A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading and---by using

the rules provided for obtaining pretrial discovery---to get any additional information he may need to prepare for trial. In the same decision, at 168, the Court states: "The motion to dismiss, however, will only be allowed when, under the former practice, a demurrer would have been sustained because the complaint affirmatively disclosed that the plaintiff had no cause of action against the defendant." (Citations omitted.) Also, in Sutton, Supra., at page 168 the North Carolina Supreme Court further states: "Thus, generally speaking, the motion to dismiss under Rule 12 (b)(6) may be successfully interposed to a complaint which states a defective claim or cause of action but not to one which was formerly labeled as a defective statement of a good cause of action. For such complaint, as we have already noted, other provisions of Rule 12, the rules governing discovery, and the motion for summary judgement provide procedures

adequate to supply information not furnished by the complaint."

The Plaintiff in Sutton, Supra., alleged that the defendants negligently allowed a pony to escape from an enclosure by failing to close the gate; that the pony at large excited some mules in another enclosure about 500 yards away, causing the mules to break out of their enclosure, with one of the mules being struck by a vehicle the plaintiff was driving about three-fourths of a mile from the enclosure from which the mules had escaped. Both the North Carolina Court of Appeals and the North Carolina Supreme Court concluded that the plaintiff in Sutton, under the provisions of Rule 8 (a)(1) of the North Carolina rules of Civil Procedure as it then read (and now reads), had stated a claim upon which relief can be granted. The Petitioner has been unable to find any statute or case decisions which reverse or greatly modify the principles set forth in Sutton.

Under North Carolina law, the facts pleaded in a complaint are the determining factors in deciding whether or not it states a claim upon which relief can be granted and the legal theory set forth does not determine the validity of the claim. Stanback v Stanback, 297 NC 181, 254 S.E. 2d 611 (1979). Also, the demand for relief is not determinative of the sufficiency of the statement of a claim. Even demanding the wrong relief is not a crucial error. Stanback v Stanback, Supra.

Rule 8 (a)(2) of the North Carolina Rules of Civil Procedure (N.C.G.S. 1A-1) states as follows:

* * * Relief in the alternative or of several different types may be demanded * * *

Rule 8 (e)(2) of the North Carolina Rules of Civil Procedure states:

A party may set forth two or more statements of a claim or defense

alternatively or hypothetically, either in one count or defense or is separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds or both. (Emphasis added).

On equitable grounds, the Petitioner included in his complaint some claims not recognized under North Carolina law, but which to the best of his knowledge, information and belief formed after reasonable inquiry are well grounded in fact and warranted by a good faith argument for the extension, modification, or reversal of existing law. Into that category falls the

Petitioner's claims for Interference With Right To Privacy (false light), Interference With Contracts, Solicitation Of Fraud. None of these appear to be in the jurisdiction of this Court, unless the Court is interested in looking into whether or not false light invasion of privacy violates one's constitutional rights pursuant to the 1st Amendment of the United States Constitution.

The Petitioner respectfully submits that the rest of his claims require no extension, modification or reversal of existing law in order to be allowed to proceed under North Carolina law. Therefore, dismissal of these claims violates the Petitioner's rights to due process and equal protection under the laws, pursuant to the 5th and 14th Amendments of the United States Constitution and his right to not be falsely defamed except when the false defamation is protected by privilege which has not been destroyed through abuse, pursuant to the 1st Amendment of the United

States Constitution, as does the North Carolina Court of Appeals' refusal to restore the claims and as does the North Carolina Supreme Court's dismissal of the Petitioner's appeal from the North Carolina Court of Appeal's decision (thereby refusing to restore the claims.)

On page 5, the Opinion of the North Carolina Court of Appeals states that the Petitioner-Plaintiff's claim for libel fails because he did not allege any type of publication. On page 6, the Opinion states that the Petitioner-Plaintiff failed in his complaint to repeat, with the sufficient particularity required for a claim for slander, the alleged defamatory statements or words. See Appendix, pp 7-8. Because of interlocking allegations, involving both written and spoken publications, the Petitioner elected to designate a single

false defamation claim as libel and slander in his Amended Complaint. See Appendix, pp 47-49. Expanding on that claim the Petitioner-Plaintiff cites and incorporates paragraphs 11, 12, 13, 14, 21 and 22 of the Amended Complaint as containing factual allegations to support the claim. See Appendix, pp 19-23, 28-29, 30-31. In paragraph 11, the Petitioner alleges who was present at a meeting and alleges that false statements were made indicating that the Petitioner-Plaintiff had failed to issue orders necessary to the proper health care of a patient, Robert B. Edmondson, Jr. See Appendix, pp 19-20. In paragraph 12, the Petitioner-Plaintiff alleges, on information and belief, that Defendant McConnell telephoned Robert Edmondson, III (the patient's son) and falsely stated or falsely inferred or falsely intimated or falsely suggested that the Petitioner-Plaintiff had not properly ordered medication and dietary measures

necessary to the care of Robert Edmondson, Jr. In the same paragraph, the Petitioner-Plaintiff, on information and belief, alleges that Defendant McConnell inferred, or intimated or suggested that the decision that Robert Edmondson, Jr. would have to leave the nursing home might be reversed if a new physician was engaged to be his attending physician (thereby falsely inferring, intimating or suggesting that the Petitioner-Plaintiff had not properly treated the patient). In paragraph 13, the Petitioner-Plaintiff alleges, on information and belief that Defendant McConnell falsely stated or falsely suggested or falsely intimated or falsely inferred to the patient's mother, Sybil Edmondson, that the patient was going to be discharged (from the nursing home) because of the Petitioner-Plaintiff's failure to order proper medication and diet for him. Paragraph 13 goes on to allege that Defendant McConnell indicated to Sybil Edmondson that

the planned forced discharge of her son might be cancelled if the family found a new attending physician for him (thereby falsely indicating that the Petitioner-Plaintiff was not providing proper professional services for the patient). In paragraph 14, the Petitioner-Plaintiff alleges that he received a copy of a letter addressed to the patient's son (Robert Edmondson, III) which contains a notice that the patient would have to leave the nursing home and which contains a false statement indicating that the nursing home was unable to properly care for the patient (because the Petitioner-Plaintiff would not order proper medication and diet for him). In paragraph 21, the Petitioner-Plaintiff, on information and belief, alleges that Defendant McConnell called the patient's son, told him that the planned forced discharge had been cancelled and falsely stated that the cancellation was based on the patient's weight having stablized plus the

discovery of a proper method by which the patient's pancreatic enzymes could be administered (thereby supplementing the previous false allegation that the Petitioner-Plaintiff had failed to prescribe proper medication for the patient) when, in fact, no change in the method of administration of the medication had occurred. In paragraph 22, the Petitioner-Plaintiff alleges that Defendant McConnell deliberately and wrongfully failed to tell the patient's son that the Plaintiff had brought in a medical consultant who agreed that only terminal care was indicated for the patient, that another medical consultation had been ordered by the Peitioner-Plaintiff and that the Petitioner-Plaintiff had found a new physician for the patient (thereby attempting to maintain as true Defendant McConnell's previous false allegations that the plaintiff had not properly treated the patient).

Under North Carolina law, false words

attributed to a defendant must be alleged either substantially in haec verba or with sufficient particularity to enable the court to determine whether the statement was defamatory. Stutts v Duke Power Co. 47 N.C. App. 76 at 84, 266 SE 2d 861 (1980). The Petitioner-Plaintiff was not present during any of the meetings or conversations referred to in paragraphs 11, 12, 13, 21 and 22. Much of his information was provided by the patient's son and mother. During the time the series of transactions are alleged to have occurred, relationships between the defendants, some other Hillhaven employees and the Petitioner-Plaintiff were not very friendly. Under the circumstances that existed, Petitioner-Plaintiff submits that he has stated his false defamation claim with sufficient particularity and that he has sufficiently alleged publication. Under any circumstances, an allegation that a defendant has falsely indicated that a physician has

neglected a patient (thereby falsely defaming the physician's professional reputation) should be sufficient, particularly when the plaintiff alleges that the defendant had improper motives for making such false defamatory statements (as the Petitioner-Plaintiff alleges in paragraphs 33 and 34 of the Amended Complaint). See Appendix, pp 40-42.

On page 7, the North Carolina Court of Appeals' Opinion states that the Petitioner-Plaintiff has failed to plead facts to support his breach of contract and interference with contract claims. The Opinion also states that the Petitioner-Plaintiff has failed to provide the defendants with reasonable notice concerning the nature of the contracts which were breached. Further, the Opinion states that the Amended Complaint fails to identify how the appellees induced third persons to breach their alleged contracts with him. Appendix, p 9-10. Plaintiff first notes that any reasonable person who is

at all familiar with the care of patients in any hospital or any long term care facility should be acutely aware that contracts are in existence between the facility operator and each of its attending physicians, between the attending physician and each of his patients in the facility and between the medical director and the facility operator (unless a physician or group of physicians fills all three roles). Further, any reasonable person who is at all familiar with the institutional care of patients should have considerable knowledge as to the general nature of the implied contracts, or implied provisions of contracts, most of which are almost universally, if not universally, in effect in such contractual relationships. Based on personal knowledge, the Petitioner-Plaintiff states that some Hillhaven, Inc. employees involved in the management of University Nursing Center had considerable such knowledge before the occurrence of any of the acts and/or

omissions alleged to have breached the contracts.

Paragraph 2 of the Amended Complaint, Appendix, p 15, contains allegations requiring Hillhaven, Inc. to carry out any provisions of contracts in effect between the Petitioner-Plaintiff and the University Nursing Center, Inc. Paragraph 36 of the Amended Complaint, Appendix, pp 43-46 spells out some of the most important provisions of the contracts in effect between the Petitioner-Plaintiff and Defendant Hillhaven, Inc. and/or University Nursing Center, Inc. In paragraph 73 of the Amended Complaint, Appendix, p 58, the Petitioner-Plaintiff identifies paragraphs 10, 11, 12, 13, 14, 15, 16, 20, 21, 22, 24, 25, 27, 28, 29, 30, 31, 32, 33 and 34 as containing allegations as to acts and/or omissions which breach the contracts between Hillhaven, Inc. and/or University Nursing Center, Inc. and the Petitioner-Plaintiff.

See Appendix, pp 18-25,27-42. Paragraph 79 of the Amended Complaint, Appendix, p 60 identifies paragraphs 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 24, 25, 27 and 28 as containing allegations of acts and/or omissions by the defendants which interfered with contracts in effect between Defendant Hillhaven, Inc. and/or University Nursing Center, Inc. and the Petitioner-Plaintiff. Under the concept of notice pleading, such should be sufficient. The Petitioner-Plaintiff contends that any organization or administrator who purports to be capable of managing a nursing home should be able to identify almost all of the acts and/or omissions alleged by him to have breached and/or interfered with contracts simply by reading the Complaint carefully. As to remaining doubts, if any, the defendants could have, and should have, moved for a more definite statement, pursuant to Rule 12 (c) of the North Carolina Rules of Civil Procedure, the

pertinent portion of which reads as follows:

(e) Motion For More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definitive statement before interposing his responsive pleading. * *

On page 7, the North Carolina Court of Appeals' Opinion indicates that the Petitioner-Plaintiff's claim for intentional infliction of emotional distress (harassment) fails because none of his allegations against the defendants rise to the level of extreme or outrageous conduct. Paragraph 61 of the Amended Complaint identifies paragraphs 11, 12, 13, 14, 15, 16, 24, 25, 27, 28, 31 and 35 as containing allegations of acts and/or omissions of the defendants that were carried out for the purpose of intentionally inflict-

ing mental distress upon the Petitioner-Plaintiff, and doing so for improper purposes. See Appendix, pp 19-25, 31-43. The Petitioner-Plaintiff submits that most reasonable persons who are familiar with the relationships between health care institutions and physicians would conclude that, within its four corners, the Petitioner-Plaintiff's Complaint contains allegations that far exceed any level of extreme or outrageous conduct which exceeds all bounds usually tolerated by a decent (well informed) society. Further, the Petitioner-Plaintiff submits that almost 100% of well informed and decent physicians would so conclude.

The North Carolina Court of Appeals' Opinion, on page 8 indicates that the Petitioner-Plaintiff failed to state the allegations upon which his claim for fraud is based with sufficient particularity. When one considers the above referred to obstacles that the Petitioner encountered as to

gathering information and when one considers the mass of factual material and multiple claims involved in the Amended Complaint, the Petitioner-Plaintiff submits that he could not be reasonably expected to state the circumstances constituting his allegations of fraud with more particularity than he has done. See Appendix, pp 52-53.

On page 8, the Court of Appeals' Opinion indicates that the Petitioner-Plaintiff's claim of conspiracy fails because the complaint does not identify an agreement among the defendants (to do an unlawful act) and because his allegations do not demonstrate that any unlawful act occurred. The Petitioner-Plaintiff submits that his Amended Complaint alleges many unlawful acts by the defendants, many of which have been cited hereinabove. In connection with allegations of facts supporting claims for false defamation, breach of contract, interference with contract and intentional infliction of

emotional distress, the complaint alleges multiple instances of interference with the physician-patient relationship. Interfering in physician-patient relationships in a nursing home is in itself illegal, pursuant to North Carolina General Statute 131 E-127 which is part of the Nursing Home Patients' Bill Of Rights (Chapter 131 E, Article 6, Part B) which states as follows:

Nothing in this part shall be construed to interfere with the practice of medicine or the physician-patient relationship.

Clearly, some of the defendants should have been aware of the Patients' Bill Of Rights and its provisions at the time of the occurrences and omissions contained in the Amended Complaint. A copy was hanging on a hall wall near the administrative offices at the time the alleged acts and omissions occurred. On several occasions, the Petitioner-Plaintiff had discussed its provisions with a Hillhaven

administrator who was at that time managing the nursing home.

The Petitioner-Plaintiff respectfully submits that, under the above circumstances and giving consideration to the difficult circumstances as to gathering information (see page 39 of this petition), his claim for fraud should have been allowed to stand at least until he had an opportunity to conduct adequate discovery. He further submits that his claim for conspiracy falls into the same category. When all of the acts and omissions of the defendants and the circumstances which are alleged within the four corners of his Amended Complaint are given consideration, it is difficult to imagine that all of those things occurred without some of the defendants and/or other Hillhaven, Inc. employees acting in concert. Further, if the defendants had trouble understanding the allegations, they could have moved for a more definite statement.

(c) The Dismissal Of All Of The Petitioner's
Claims In Itself Violates The Petition-
er's Right To Due Process And Equal
Protection Under The Laws And His Right
To A Claim For Unjustifiable False
Defamation, Pursuant To The 1st Amendment
Of The United States Constitution, As Does
The Failure Of The North Carolina
Appellate Courts To Restore Some Of The
Claims.

As indicated hereinabove, the
Petitioner-Plaintiff contends that his
Amended Complaint contains sufficient
allegations to support at least one claim
recognized under North Carolina law. He
further submits that the Amended Complaint
itself offers clear and convincing evidence
that it was dismissed as to failing to state
a claim upon which relief could be granted
because the trial judge was biased, provided
that he was not negligent or incompetent.
Any of the three violates the Petitioner-

Plaintiff's rights to due process and equal protection under the laws, pursuant to the 5th and 14th Amendments of the United States Constitution and violates his right to a claim for unjustified false defamation pursuant to the 1st Amendment of the United States Constitution. As stated above, the Petitioner-Plaintiff could not be expected to so contend in the trial court when the last hearing held in this action was some 7 months before the Order dismissing the action was entered. Nor could he reasonably be expected to raise the issue in the trial court after the Order was entered.

As stated on page 7 above, the Petitioner-Plaintiff raised the issue of violation of his constitutional rights of due process and equal protection under the laws, pursuant to the 5th and 14th Amendments of the United States Constitution, in his assignment of error in his Record On Appeal filed with the North Carolina Court of

Appeals. Appendix, p 67. In his briefs, the Petitioner-Plaintiff argued that the dismissal alone violated his rights to due process and equal protection under the laws. However, because of fear that he might arouse bias in the Court of Appeals, he did not spell out his contentions as to bias (and/or negligence and/or incompetence) being the cause of the dismissal. Doing so clearly might have created bias against him in the eyes of some of the Court of Appeals' Panel. At this point, the Petitioner-Plaintiff feels compelled to submit that the contents of the Amended Complaint strongly support a contention that the Court of Appeals' concurrence with the trial court's inability to identify a claim upon which relief can be granted was probably due to bias on the part of one or more of the Court of Appeals' panel which heard the appeal in this action.

In his Notice Of Appeal to the North

Carolina Supreme Court, the Petitioner-Plaintiff raised issues as to whether both the trial court's dismissal and the Court Of Appeals' affirmation of the dismissal violated his Constitutional due process and equal protection of the law rights. In his Petition For Discretionary Review addressed to the North Carolina Supreme Court, the Petitioner-Plaintiff went further and brought forth facts suggesting that one or more members of the North Carolina Court Of Appeals' Panel which heard the appeal in this action might have been biased. Further, he referred to other proceedings and rulings which he contends to have been influenced by bias in the trial court and in the Court Of Appeals. For example, he cited a summary judgement based in part on absolute privilege as to news reports of judicial proceedings in an action against a TV station which is closely related to this action. And he cited the fact that the trial court later entered a

sanction of \$13,450 in attorney's fees against the Petitioner-Plaintiff, based largely on the summary judgement entered, for having filed a frivolous complaint found to be a sham upon the court. Further, he cited the improper dismissal of all matters appealed from except the entry of sanctions by a different trial court judge(who now sits on the Court Of Appeals) who had no authority to do so and how it took the Petitioner 22 months to get the Court Of Appeals to restore his right to appeal as to the summary judgement and other issues improperly dismissed. (The summary judgement issue, first appealed 3 years ago, has still not been resolved.) Further, the Petitioner-Plaintiff cited the fact that a young attorney who had done much of the legal work in the above referred to action against the TV station had accepted a job as a law clerk for one of the Court Of Appeals' judges on the panel in that case, that counsel for the

defendants had made a motion that the appellate judge recuse himself in that action and that he refused to do so. And the Petitioner-Plaintiff went on to point out that the same Court of Appeals' judge (Judge Edward K. Greene), was on the panel that heard the Petitioner's appeal in the instant action.

In his Petition For Discretionary Review, the Petitioner-Plaintiff urged the North Carolina Supreme Court to make an effort, through its supervisory powers, to reduce errors in the courts below. He urged that greater accountability should be required as to erroneous decisions in the courts below. But he also stated that judges, like physicians, should not be expected to be completely free of making honest mistakes and he made it clear that he does not imply that all judges commit errors with greater frequency as of greater severity than should be acceptable.

The Petitioner-Plaintiff respectfully submits that his contentions as to the trial court and the North Carolina Court Of Appeals having entered biased rulings against him, while strongly supported by the relevant facts, may have triggered more bias in the Supreme Court. He submits that he should have been allowed to pursue his appeal in the North Carolina Supreme Court as a matter of right because in connection with his libel and slander issues are involved as to the defendants' rights and his own rights, prusuant to the 1st Amendment of the United States Constitution, and because the dismissal by the trial court and its affirmation by the Court Of Appeals clearly deprive him of his property right to a claim (s) and thereby violates his rights pursuant to the 5th and 14th Amendments of the United States Constitution. Further, the allegations contained in the Amended Complaint offer substantial evidence that the trial court's

dismissal and the affirmation of the dismissal by the Court Of Appeals probably occurred because of bias. If bias played a part in the entry of an erroneous decision in the trial court or either of the appellate courts, such violated the Petitioner-Plaintiff's rights to due process and equal protection under the laws pursuant to the 5th and 14th Amendments of the United States Constitution and his 1st Amendment right to be protected from unjustified false defamation, if such a right exists. The Petitioner-Plaintiff further submits that the allegations contained in the Amended Complaint offer substantial evidence that the Supreme Court's decision not to accept his appeal as an appeal of right was probably due to bias.

Since the North Carolina Supreme Court did not agree that he was entitled to an

appeal of right, the Petitioner-Plaintiff submits that discretionary review should have been allowed by that Court. He further contends that the contents of the Amended Complaint offer strong evidence that the North Carolina Supreme Court's refusal to grant discretionary review may have been due to bias. He is not sure whether or not such bias, if present, constitutes abuse of discretion by that Court, but he submits that it should.

(d) The North Carolina Courts Are Sending Health Care Facility Operators A Bad Message.

The relationships between the operators of inpatient health care facilities and attending physicians are similar in most institutions that rely on non-employee physicians to provide medical services to

the patients or residents of the facilities. Express or implied contract provisions are always present under such circumstances. Almost universally, such contracts provide that the therapeutic decisions as to the care of a patient or resident will be made by the patient's attending physician, with the informed consent of the patient (or his representative if he is incompetent). That did not come to pass by accident. It is of great importance to the proper care of patients. If a physician appears to be far astray in his decisions, facility operators are usually contractually free to have the care provided by the physician reviewed by other physicians. But they are contractually at peril if they interfere with a physician's therapeutic decisions without such peer review unless the circumstances demand immediate intervention. The North Carolina court rulings in this case tell health care facility operators that they can

wrongfully reject decisions of competent attending physicians, at will and with little concern as to the possibility that attending physicians will be able to meaningfully challenge their actions. More important, patients are likely to be damaged by the wrongful decisions of operators of health care facilities who elect to overrule the decisions of physicians without the input of anyone qualified to do so.

Some 6 weeks after the North Carolina Supreme Court dismissed the Petitioner's Appeal and denied his petition for discretionary review, the defendants filed their Motion To Impose Sanctions For Frivolous Appeals with the North Carolina Court Of Appeals. On June 18, 1990, the Court Of Appeals denied the motion (and did so without a response by the Petitioner). The Petitioner submits that information to this Court as an example that the defendants have already received a message

that is bad for the care of institutionalized patients and for their attending physicians. Under the circumstances, one would think that the defendants would be happy to have prevailed in the trial court and the North Carolina appellate courts. But that was not enough. The Petitioner submits that the defendant were seeking to put a damper on other physicians as to filing claims against the operators of health care facilities who engage in conduct that is detrimental to good health care.

(c) The Petitioner-Plaintiff Deserves Fair Treatment In The Courts.

The Petitioner-Plaintiff, now age 65 years, submits that he is a competent physician who has practiced family medicine for 35 years, mostly in small towns. He received a Bronze Star and a Letter Of Commendation with a Combat "V" in connection with his service as a medical officer with

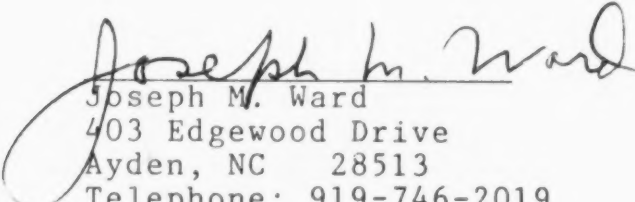
the First Marine Division during the Korean War. He has served as president of two county medical societies. The controversy which engulfed University Nursing Center, four related unjustified malpractice actions (he has finally prevailed in all of them) and other interlocked legal actions related to false defamation of him by several media outlets have made his life a nightmare for the last 4½ years. He respectfully submits that he deserves and is entitled to the same protection under the laws and to as much due process as is afforded other citizens, including criminals. He respectfully submits that in the instant case, he has not received such treatment.

CONCLUSION

For the foregoing reasons the Petitioner respectfully requests that the Court issue a writ of certiorari to review

the dismissal of the Petitioner's Appeal by the North Carolina Supreme Court and, if appropriate, the Opinion entered in the North Carolina Court Of Appeals and the Order dismissing all of the Petitioner-Plaintiff's claims that was entered in the trail court.

Respectfully submitted, this the 6th
day of July, 1990.


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Petitioner-Plaintiff

